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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

LAS VEGAS DIVISION

2012 JUN -8 A 3:22

UNITED STATES OF AMERICA

C

Plaintiff/Respondent

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V.

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Case No: 2:10-CR-00520-MMD-RJJ

SHAWN TALBOT RICE

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2:09-CR-00078-JCM-RJJ-2

Defendant/Movant

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**MEMORANDUM ON JUDICIAL NOTICE**

**Introduction**

Judges of all courts both State and Federal within these United States shall take as true without formal proof the statute or document that is subject to judicial Notice wherein the judge has no discretion unless proof is provided invalidating the statute or document including but not limited to the Constitution of the United States, the Laws of the United States, Bankruptcy Laws, the laws of the several States, the constitutions of the several States, the public statutes of the United States and the several States, all of the publications in the Federal Register with the additional test if they have the "force and effect of law" as "substantive regulations" creating then an Obligation of Law (duty) upon one of the people in these United States and other documents subject to judicial Notice.

1.

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	14.	

## **I. Judges are Presumed to Know the Law**

In *Groh v. Ramirez*, 540 U.S. 551, 563, 564 (2004) “If the law was clearly established . . . a reasonably competent public official should know the law governing his conduct.” Citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982); *State of Ohio v. Davis*, 584 N.E.2d 1192, 1196 (Sup.Ct. Ohio 1992) “Judges, unlike juries, are presumed to know the law.”; *Leary v. Gledhill*, 84 A.2d 725, 728 (Sup.Ct. NJ 1951) “A court will in general take judicial notice of and apply the law of its own jurisdiction without pleading or proof thereof, the judges being deemed to know the law or at least where it is to be found.”

“Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.”

## **II. If it is Subject to Judicial Notice, Then it is Taken as True**

In the adjudged decision of *Veney v. Wyche*, 293 F.3d 726, 730 (4<sup>th</sup> Cir. 2002) citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9<sup>th</sup> Cir. 2001) “Nor must we “*accept as true allegations that contradict matters properly subject to judicial notice* or by exhibit.”” **[Emphasis added]** See also *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900, 901 (9<sup>th</sup> Cir. 2007); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9<sup>th</sup> Cir. 2008); *Gilead Sciences Securities Litigation v. Gilead Sciences, Inc.*, 536 F.3d 1049,

1 1055 (9<sup>th</sup> Cir. 2008); *Walter v. Drayson*, 496 F.Supp.2d 1162, 1165 (Dist. Ct. Hawaii 2007)

2 In *Hutchinson v. State of Indiana*, 477 N.E.2d 850, 854 (Sup.Ct. Ind. 1985) “Judicial  
3 notice excuses the party having the burden of establishing a fact from the necessity of producing  
4 formal proof.”

5

6 **III. Judicial Notice is Proof being Superior to Evidence**

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9 In *State v. Main*, 37 A. 80, 84 (Sup.Ct.Err. Conn. 1897) “**Judicial notice takes the place of**  
10 **proof, and is of equal force. As a means of establishing facts, it is therefore superior to**  
11 **evidence.** In its appropriate field, it displaces evidence, since, as it stands for proof, it fulfills the  
12 object which evidence is designed to fulfill, and makes evidence unnecessary.” In *State v.*  
13 *Tomanelli*, 216 A.2d 625, 628 (Sup.Ct. Conn. 1966) ““To take judicial notice is a function, and to  
14 apply it to the decision of causes a right, which appertains to every court of justice, from the  
15 lowest to the highest.”” (cites omitted). In *Sands v. McCormick*, 502 F.3d 263, 268  
16  
17 (3<sup>rd</sup> Cir. 2007) “In *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181  
18 F.3d 410, [426] (3d Cir.1999), we noted that **judicial proceedings constitute public records**  
19 and that **courts may take judicial notice of another court's opinions.** *Id.* at 426. \* \* \* We  
20 explained that a court may take judicial notice of another court's opinion to use it as proof that  
21 evidence existed to put a party on notice of the facts underlying a claim.  
22  
23 [Ibid. *Southern Cross* at 428.]”

1       In *Beadnell v. United States*, 303 F.2d 87, 89 (1962) “Proof of facts judicially known  
 2       was unnecessary. FN 5 (cites omitted).” See *Mills v. Denver Tramway Corp.*, 155 F.2d 808,  
 3  
 4       811 (10<sup>th</sup> Cir. 1946).

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 6       **IV. Court to Say What an Enacted Statute Means**  
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 9       In *Elmendorf v. Taylor*, 23 (10 Wheat) 152, 160 (1825) “”[T]he construction given by this  
 10      Court to the constitution and laws of the United States is received by all as true construction . . . .”  
 11

12      In *Bousley v. United States*, 523 U.S. 614 (1998), to wit:

13  
 14      It is **this Court's responsibility to say what a statute means**, and once the Court has  
 15      spoken, it is the **duty of other courts to respect that understanding of the governing**  
 16      **rule of law**. A judicial construction of a statute is an authoritative statement of what the  
 17      statute meant before as well as after the decision of the case giving rise to that  
 18      construction.” *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994).

19      See *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312, 313 (1994); *Tran v. Mukasey*, 515 F.3d  
 20      478, 484 (5<sup>th</sup> Cir. 2008); *Tuan Thai v. Ashcroft*, 366 F.3d 790, 797 (9<sup>th</sup> Cir. 2004);  
 21      *Xi v. U.S. I.N.S.*, 298 F.3d 832, 836 (9<sup>th</sup> Cir. 2002);

22      In *N.L.R.B. v. Health Care & Retirement Corp. of America* 511 U.S. 571, 582 (1994)  
 23  
 24      “[S]ince it is the function of the courts and not the Legislature, much less a Committee of one  
 25      House of the Legislature, to say what an enacted statute means. *Pierce v. Underwood*, 487  
 26      U.S. 552, 556, 557 (1988).” See *Luessenhop v. Clinton County, New York*, 466 F.3d 259, 268  
 27

1 (2<sup>nd</sup> Cir. 2006); *Tax and Accounting Software Corp. v. United State*, 301 F.3d 1254, 1265,  
2 1266 (10<sup>th</sup> Cir. 2002); *American Trucking Assoc. Inc. v. U.S. E.P.A.*, 175 F.3d 1027, 1052  
3 (C.A.D.C. 1999); *Beverly Enterprises, Virginia, Inc. v. N.L.R.B.*, 165 F.3d 290, 298  
4 (4<sup>th</sup> Cir. 1999); *Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 18  
5 (1<sup>st</sup> Cir. 1995); *Mississippi Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 315 (1994); *United  
6 States v. Williams*, 23 F.3d 629, 634 (2<sup>nd</sup> Cir. 1994); *Mississippi Poultry Ass'n, Inc. v.  
7 Madigan*, 992 F.2d 1359 (5<sup>th</sup> Cir. 1993); *Gray Panthers Advocacy Comm. v. Sullivan*, 936  
8 F.2d 1284, 1288 (C.A.D.C. 1991); *Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*,  
9 909 F.2d 1266, 1279 (9<sup>th</sup> Cir. 1990); *Scalise v. Thronburgh*, 891 F.2d 640, 645 (7<sup>th</sup> Cir. 1989);  
10 *Home Group, Inc. v. C.I.R.*, 875 F.2d 377, FN7 (2<sup>nd</sup> Cir. 1989); *Madison Galleries,  
11 Ltd. v. United States*, 870 F.2d 627, 633 (C.A. Fed. Cir. 1989).

12 It is this Court's responsibility to say what a statute means, and once the Court has  
13 spoken, it is the duty of other courts to respect that understanding of the governing rule of  
14 law. A judicial construction of a statute is an authoritative statement of what the statute  
15 meant before as well as after the decision of the case giving rise to that construction."

16 *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-313, 114 S.Ct. 1510, 1519,  
17 128 L.Ed.2d 274 (1994).

18 In *Harrison v. Commissioner, Div. of Motor Vehicles*, 2010 WL 2243429, \*6 (Sup.Ct.

1 App. Va. 2010) “It is this Court’s responsibility to say what a statute means, and once the  
2 Court has spoken, it is the duty of other courts to respect that understanding of the governing rule  
3 of law. *A judicial construction of a statute is an authoritative statement of what the statute meant*  
4 *before as well as after the decision of the case giving rise to that construction.*” See  
5  
6 *Richardson v. Honda Mfg. of Alabama, LLC*, 635 F. Supp.2d 1261, 1272 (N.D. Ala 2009).  
7  
8 *Seiz Co. v. Arkansas State Highway and Transp. Dept.*, 2009 WL 1740251 (Ark.)  
9  
10 (Sup.Ct. Ark. 2009) [I]t is this court’s duty to decide what a statute means *Johnson v. Bonds*  
11 *Fertilizer, Inc.*, 226 S.W.3d 753, 755 (2006).”  
12

#### 13                   V. Invalidating a Statute

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15                   In *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, 410 (1926) “Invalidity may be shown by  
16 things which will be judicially noticed (*Quong Wing v. Kirkendall*, 223 U. S. 59, 64, (1912)) or  
17 by facts established by evidence. The burden is on the attacking party to establish the invalidating  
18 facts. See *Minnesota Rate Cases*, 230 U. S. 352, 452 (1913).” In *Minnesota Rate Cases*, 230  
19 U. S. 352, 452, 453 (1913) “It is fundamental that the judicial power to declare legislative action  
20 invalid upon constitutional grounds is to be exercised only in clear cases. The constitutional  
21 invalidity must be manifest, and if it rests upon disputed questions of fact, the invalidating facts  
22  
23 must be proved. And this is true of asserted value as of other facts.” In *Hoyt v. Russell*, 117  
24 U.S. 401, 403-404 (1886) “Judicial Notice . . . boundaries of a state or territory where it  
25  
26  
27

1 holds its sessions, and of judicial districts, and municipal subdivisions within it . . . the extent  
 2 of its jurisdiction, not only of the subjects placed by law under its cognizance, but of its  
 3 extent territorially.”

5 **VI. Objections to Judicial Notice**

8 In *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 570 (1<sup>st</sup> Cir. 2004) “One  
 9 of the requirements of Rule 201 is procedural, namely, that the parties be given notice  
 10 and an opportunity to object to the taking of judicial notice. \* \* \* In any event the rule also require  
 11 s both that the noticed fact be “not subject to reasonable dispute” and that it be so either (1) on  
 12 the basis of general knowledge within the territorial jurisdiction of the trial court or (2) because  
 13 it is capable of being determined by an assuredly accurate source.” In *In re Aughenbaugh*,  
 14 125 F.2d 887, 890 FN4 (3<sup>rd</sup> Cir. 1941) “Wigmore, in his treatise on evidence (Third Edition)  
 15 Sec. 2566, states that judicial notice means ‘ \* \* \* acceptance of a matter as proved without  
 16 requiring the party to offer evidence of it.’”

21 **VII. Judicial Notice is Not Limited by the Knowledge of Judge**

22 In *Fox v. City of West Palm Beach*, 383 F.2d 189, 194-59 (5<sup>th</sup> Cir. 1957), to wit:

24 The court may, of course, **take judicial notice of facts which need not be proved**. The most  
 25 frequent application of the judicial notice doctrine is common knowledge. The rule has been  
 26 thus declared: **‘Judicial notice in any particular case is not determined or limited by the**  
**actual knowledge of the individual judge or court.** This means that it is not essential that  
 27 matters of judicial cognizance be actually known to the judge; if they are proper subjects of  
 judicial notice, the judge may inform himself in any way which may seem best to his  
 discretion, and act accordingly.

1       In *Shapleigh v. Mier*, 299 U.S. 468, 475 (1937) “To say that a court will take **judicial**  
2       **notice of a fact**, whether it be an event or a custom or a **law** of some other government, is  
3       merely another way of saying that the **usual forms of evidence will be dispensed with if**  
4       **knowledge of the fact can be otherwise acquired.**” *Ibid.* at 475 “But the truth, of course,  
5       is that **judicial notice and judicial knowledge are far from being one.** \* \* \* To the contrary,  
6       a court that is left without knowledge of a fact after exploring to the full every channel of  
7       information must needs decide against the litigant who counts upon the fact as an essential of his  
8       claim.”  
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14       **VIII. Judicial Notice of Little and Brown Publications are Competent Evidence**  
15       **of the Several Public and Private Acts of Congress**  
16  
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18       Without further proof or authentication thereof the laws and treaties of the United States,  
19       published by Little and Brown are competent evidence without further proof codified at 1  
20       U.S.C. § 113, to wit:

21       The edition of the laws and treaties of the United States, published by Little and Brown,  
22       and the publications in slip or pamphlet form of the laws of the United States issued  
23       under the authority of the Archivist of the United States, and the Treaties and Other  
24       International Acts Series issued under the authority of the Secretary of State **shall be**  
25       **competent evidence of the several public and private Acts of Congress**, and of the  
26       treaties, international agreements other than treaties, and proclamations by the President  
27       of such treaties and international agreements other than treaties, as the case may be,  
      therein contained, **in all the courts of law and equity and of maritime jurisdiction,**  
      **and in all the tribunals and public offices of the United States, and of the several**  
      **States, without any further proof or authentication thereof.**

1       In *White v. St. Guirons*, Minor 331, 345 (Sup.Ct. Ala 1824) “There could be no Error in  
2 reading an Act of Congress in pamphlet form, and this Exception requires no answer. **The**  
3  
4 **Court was bound to know the law of the land.**” In *Jordan v. McDonnell*, 44 So. 101, 103  
5 (Sup.Ct. Ala 1907) “The courts of the state take judicial notice of the acts of Congress. *Davis*  
6  
7 ‘*Est. v. Watkins*, 76 N. W. 575, 56 Neb. 288 (Sup.Ct. Neb. 1898); *White v. Saint Guirons*, Minor,

8 332, 12 Am. Dec. 56 (Sup.Ct. Ala 1824). See *Towns v. Towns*, 25 So. 715 (Sup.Ct. Ala 1899).

9

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11       **IX. Judicial Notice of the Law and Constitution**

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14       In *Marbury v. Madison*, 1 Cranch 137, 138 (1803) “The courts of the United States are bound  
15 to take **notice of the constitution.**” In *Newcomb v. Brennan*, 558 F.2d 825, 829 (7<sup>th</sup> Cir. 1977)  
16 “We hold that matters of public record such as state statutes, city charters, and city ordinances  
17 fall within the category of “common knowledge” and are therefore proper subjects for judicial  
18 notice.” *Ibid.* “A court may take judicial notice of facts of “common knowledge” in ruling on a  
19 motion to dismiss.” In *Prudential Ins. Co. of America v. Carlson*, 126 F.2d 607, 611  
20 (10<sup>th</sup> Cir. 1942) “. And while federal courts take **judicial notice of the laws** not only of the  
21 forum but also those of other states [cites omitted] that means no more than that one relying  
22 upon a statute of a foreign state need not plead it.”

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1                   **X. District Court of the United States to Take Judicial Notice of Statutes of the**  
2                   **United States**  
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5                   In *United States v. Harris*, 331 F.2d 600, 600 (6<sup>th</sup> Cir. 1964), to wit:

6  
7                   The District Court will also take judicial notice of the statutes of the United States.  
8                   *United States v. Fullard-Leo*, 331 U.S. 256, 269, 67 S.Ct. 1287, 91 L.Ed. 1474; *Louisville*  
9                   *Gas & Electric Co. v. Federal Power Commission*, 129 F.2d 126, 134, C.A. 6th, cert.  
10                  denied, 318 U.S. 761, 63 S.Ct. 559, 87 L.Ed. 1133, rehearing denied, 318 U.S. 800, 63  
11                  S.Ct. 768, 87 L.Ed. 1164; *Cohen v. United States*, 129 F.2d 733, 736, C.A. 8th. Section  
12                  115(b)(1), Title 28, United States Code, provides that Hamilton County is in the Southern  
13                  District of Ohio. Nor is it necessary that the Court be requested to take judicial notice of a  
14                  fact before it is authorized to do so. The Court may take judicial notice sua sponte.  
15                  *Weaver v. United States*, supra, 298 F.2d 496, 498, C.A. 5th; *Mills v. Denver Tramway*  
16                  *Corp.*, 155 F.2d 808, 812, C.A. 10<sup>th</sup>.

17  
18                  **XI. Federal Courts to Take Judicial Notice of Laws of the Several States**

19  
20                  In *Elwood v. Flannigan*, 104 U.S. 562, 568 (1881) “[T]he courts of the United States take  
21                  judicial notice of all the public laws of the several States.” See *Hanley v. Donoghue*, 116  
22                  U.S. 1, 6 (1885); *Course v. Stead*, 4 U.S. 22, 27 (1800); *Lamar v. Micou*, 114 U.S. 218, 223  
23                  (1885) “The law of any state of the Union, whether depending upon statutes or upon judicial  
24                  opinions, is a matter of which the courts of the United States are bound to take judicial notice,  
25                  without plea or proof. See *White v. Gittens*, 121 F.3d 803, FN1 (1<sup>st</sup> Cir. 1997);  
26                  *Vagaszki v. Consolidation Coal Co.*, 225 F. 913, 915 (2<sup>nd</sup> Cir. 1915); *Parkway Baking Co. v.*

1      *Freihofer Baking Co.*, 255 F.2d 641, 646 (3<sup>rd</sup> Cir. 1958); *United States v. White*, 258 F.3d 374  
 2      FN9 (5<sup>th</sup> Cir. 2001); *J.M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77, 78 (5<sup>th</sup> Cir. 1962);  
 3  
 4      *United States v. Dedman*, 527 F.3d 577, 586 (6<sup>th</sup> Cir. 2008); *McIndoo v. Burnett*, 494 F.2d 1311,  
 5  
 6      1313 (8<sup>th</sup> Cir. 1974). In *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312,  
 7  
 8      320 (1<sup>st</sup> Cir. 2004) "[t]he law of any state of the Union, whether depending upon statutes or  
 9  
 10     upon judicial opinions, is a matter of which the courts of the United States are bound to take  
 11     judicial notice without plea or proof."

11     In *Covington Drawbridge Co. V. Shepherd*, 61 U.S. 227, 232 (1857) "The statute of  
 12  
 13     the Legislature of Indiana . . . is therefore a public law, of which the Circuit Court [  
 14  
 15     United States] and this court [Supreme Court of the United States] are bound to take judicial  
 16  
 17     notice, without its being pleaded or offered in evidence. For wherever a law of a State is held  
 18  
 19     to be a public one, to be judicially taken notice of by the State courts, it must be regarded in like  
 20  
 21     manner by a court of the United States, when it is required to administer the laws of the State."

21     **XII. Judicial Notice of Public Statutes and Plead Facts To Statute**

24     In *Federal Crop Ins. Corp. V. Merrill*, 332 U.S. 380, 384-85 (1947) "Just as everyone is  
 25  
 26     charged with knowledge of the United States Statutes at Large, Congress has provided that  
 27  
 the appearance of rules and regulations in the **Federal Register** gives legal notice of their

1 **contents.”** In *Armstrong v. United States*, 80 U.S. 154 (1871) “This was a **public act of which**  
2 **all courts of the United States are bound to take notice**, and to which **all courts are bound**  
3 **to give effect.”** In *Charles Boldt Co. v. Turner Bros. Co.*, 199 F. 139 (7<sup>th</sup> Cir. 1912)  
4 “However, the **statute means something**, and when this is comprehended it is the duty of the  
5 **courts to give it effect.”** In *Jones v. United States*, 137 U.S. 202, 214 (1890) “All courts of  
6 justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised  
7 by the government whose laws they administer, or of its recognition or denial of the sovereignty  
8 of a foreign power, **as appearing from the public acts of the legislature and executive**,  
9 although those acts are not formally put in evidence, nor in accord with the pleadings.” In  
10 *United States v. Reynes*, 50 U.S. 127 147-48 (1850) “The **treaties** above mentioned, the public  
11 acts and proclamations of the Spanish and French governments, and those of their publicly  
12 recognized agents, in **carrying into effect those treaties**, though not made exhibits in this  
13 cause, are historical and notorious facts, of which the court can take regular judicial  
14 notice; and reference to which is implied in the investigation before us.” In *Knight v.*  
15 *United Land Ass’n*, 142 U.S. 161, 169 (1891) “[S]tatutes of the United States and of the  
16 state of California, and the records of the interior department, of all of which the court can take  
17 judicial notice.”

18 In *Caha v. United States*, 152 U.S. 211, 222 (1894), to wit:

19 [I]t may be laid down as a general rule, deducible from the cases, that wherever, by the  
20

1 express language of any act of congress, power is entrusted to either of the principal  
 2 departments of government to **prescribe rules and regulations for the transaction of**  
 3 **business in which the public is interested**, and in respect to which they have a right to  
 4 participate, and by which they are to be controlled, the **rules and regulations prescribed**  
 5 **in pursuance of such authority become a mass of that body of public records of**  
 6 **which the courts take judicial notice**.

7  
 8 In *Jones v. United States*, 137 U.S. 202, 214(1890), to wit:

9 All courts of justice are bound to take judicial notice of the territorial extent of the  
 10 jurisdiction exercised by the government **whose laws they administer**, or of its  
 11 recognition or denial of the sovereignty of a foreign power, as appearing from the **public**  
 12 **acts of the legislature** and executive, although those acts are not formally put in  
 13 evidence, nor in accord with the pleadings.

14 In *Southern Cotton Press & Mfg. Co. v. Bradley* 52 Tex. 587, \*6 (Sup.Ct. Tex. 1880)

15 “[T]he court would take judicial notice of it, as of **any public statute**, and **apply the law**  
 16 **arising there from to the facts of the case.**” In *Atlantic Coast Line R. Co. v. State*, 73 Fla.609,  
 17 624 (Sup.Ct. Fla. 1917) “Courts will take judicial notice of **all general or public domestic**  
 18 **statutes**, and they need not be specially pleaded.” *Ibid.* Where **a public statute is applicable to**  
 19 **a case**, it is sufficient that the pleading of the party who seeks to rely upon the statute **shall set**  
 20 **forth the facts which bring the case within it**; and it is not necessary to recite the title of the  
 21 act or otherwise designate or even section, to it.” In *Goldberg v. Friedrich*, 279 Pa. 572

22 (Sup.Ct. Pa 1924) “It may also be stated, however, as a rule universally recognized, that **courts**  
 23 **will take judicial notice of its public statutes**. Such laws need not be pleaded or proved; it  
 24 is not necessary to allege a violation of the statute, but, of course, the statement must set forth  
 25

1 sufficient facts to bring the case within the statute.” In *Newson v. City of Kansas City*, 606  
2 S.W.2d 487, 490 (Ct.App. Mo. 1980) “The rule of judicial notice applies to public statutes . . .  
3  
4 ” *Ibid*, “The doctrine of judicial notice is a rule of evidence which **presumes the matter**  
5 **subject to notice as true** and so does away with the formal necessity of present proof.” *Ibid*.  
6  
7 “A party who **seeks avail of a public statute must state facts which bring the cause of action**  
8 **with its purview.**” In *Jones v. Chicago, B. & Q. R. Co.*, 125 S.W.2d 5, 13 (Sup.Ct. Mo. 1938)  
9  
10 “One who desires to avail himself of a public statute is not required to plead the statute by  
11 distinct mention of it or reference to it, but is **only required to plead the facts which bring**  
12  
13 **his case within its purview.**” See *Emerson v. St. Louis 7 H. Ry. Co.*, 19 S.W. 1113, 1113  
14 (Sup.Ct. Mo. 1892); *Reynolds v. Chicago & A.R. Co.*, 85 Mo. 90, \*2 (Sup.Ct. Mo. 1884);  
15  
16 *Kennayde v. Pacific R.Co.*, 45 Mo. 255, \*1 (Sup.Ct. Mo. 1870); *Bayard v. Smith*, 17 Wend.  
17 88, 90 (Sup.Ct. Jud. N.Y. 1837); *City of Utica v. Richardson*, 6 Hill 300 (Sup.Ct. N.Y. 1844);  
18  
19 *People v. Bartow*, 6 Cow. 290 (Sup.Ct. N.Y. 1826); *Chipman & Aughinbaugh v Emeric*, 5 Cal.  
20 239, 239 (Sup.Ct. Ca. 1855). In *Bly v. Skaggs Drug Center, Inc.*, 562 S.W.2d 723, 726  
21 (Ct.App. Mo 1978) “(i)t is a well-settled rule that courts of justice are bound to take **judicial**  
22  
23 **notice of public statutes** enacted by the legislature of the state where the courts are held.” In  
24  
25 *Oneida Indian Nation of New York, et al., v. State of New York*, 691 F.2d 1070, 1086  
26 (2<sup>nd</sup> Cir. 1982) “When there is no dispute as to the authenticity of such materials and **judicial**  
27

1 notice is limited to law, legislative facts, or factual matters that are incontrovertible, such  
2 notice is admissible. Fed.R.Evid. 201(b), \* \* \*

3  
4 [U]ndisputed background history of the period when the statute was passed.” (cites omitted).

5 In *The United State v. Thomas Tingey*, 30 U.S. 115, 125 (1831) “What those duties are  
6 [navy pursers], except so far as they are incidentally disclosed in public laws, cannot be  
7 judicially known to this court.” In *Dillon v. Gloss*, 256 U.S. 368, 376 (1921) “Its  
8 ratification [Eighteenth Amendment], of which we take judicial notice, was consummated  
9 January 16<sup>th</sup>, 1919.” In *Bird v. Commonwealth*, 21 Gratt 800, 800 (Sup.Ct.App. Va 1871)  
10 “The Maryland law thereby became the law of Congress in said District, and is to be taken notice  
11 of by State courts, without proof.” In *Bayly's Adm'r v. Chubb*, 57 V. 284, 287 (Sup.Ct.App. Va  
12 1862) “[I]t must treat them [District of Columbia] as it does any other public acts of  
13 Congress passed in pursuance of the constitution, which it is required to administer, to  
14 wit, as supreme public laws of the land--laws which the court is presumed to know and is  
15 bound to notice without requiring them to be first proved.” In *Hennessy v. Penril  
16 Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7<sup>th</sup> Cir. 1995) “In order for a fact to be  
17 judicially noticed, indisputability is a perquisite.” In *Laborers' Pension Fund. V. Blackmore  
18 Sewer Const., Inc.*, 298 F.3d 600 (7<sup>th</sup> Cir. 2002) “We [7<sup>th</sup> Cir.] may take judicial notice of matters  
19 of public record . . .” In *520 South Michigan Ave. Associates, Ltd. v. Shannon*, 549 F.3d 1119,  
20  
21  
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27

1 1138 FN14 (7<sup>th</sup> Cir. 2008) “A court may “take judicial notice of historical documents,  
2 documents contained in the public record, and reports of administrative bodies....” *Menominee*  
3  
4 *Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir.1998). Thus, we may take judicial  
5 notice of the state court decisions.” In *Stutzka v. McCarville*, 420 F.3d 757, 761 FN2  
6  
7 (8<sup>th</sup> Cir. 2005) “Because we may take judicial notice of judicial opinions and public records,  
8 see, e.g., *United States v. Eagle boy*, 200 F.3d 1137, 1140 (8<sup>th</sup> Cir. 1999)”. In *Stahl v. U.S.*  
9  
10 *Dept. of Agriculture*, 327 F.3d 697, 700 (8<sup>th</sup> Cir. 2003) “The district court may take judicial  
11 notice of public records and may thus consider them on a motion to dismiss. *Faibisch v. Univ. of*  
12  
13 *Minn.*, 304 F.3d 797, 802-03 (8th Cir.2002).” In *Sears, Roebuck & Co. v. Metropolitan*  
14  
15 *Engravers, Limited*, 245 F.2d 67, 70 (9<sup>th</sup> Cir. 1957) “It is true, judicial notice may be taken of a  
16 fact to show that a complaint does not state a cause of action.” In *Nev-Cal Elec. Securities*  
17  
18 *Co. v. Imperial Irr. Dist.*, 85 F.2d 886, 905 (9<sup>th</sup> Cir. 1936) “An appellate court can properly take  
19 judicial notice of any matter of which the court of original jurisdiction may properly take notice.”  
20  
21 In *United States v. Wolny*, 133 F.3d 758, 764 (10<sup>th</sup> Cir. 1998) “A judge takes judicial notice  
22 when he recognizes the truth of a matter that is either “generally known” or “capable of  
23 accurate and ready determination by resort to sources whose accuracy cannot reasonably  
24 be questioned.” Fed.R.Evid. 201(b).” In *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218,  
25  
26 (10<sup>th</sup> Cir. 2007) “Federal Rule of Evidence 201(b) states: “A judicially noticed fact must be one  
27

1 not subject to reasonable dispute in that it is either (1) generally known within the territorial  
 2 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to  
 3 sources whose accuracy cannot reasonably be questioned.””

5 In *Mills v. Green*, 159 U.S. 651, 657, 658 (1895), to wit:

7 The lower courts of the United States, and this court of appeal from their decisions,  
 8 **take judicial notice of the constitution and public laws of each state of the Union**  
*Owings v. Hull*, 9 Pet. 607, 625; *Lamar v. Micou*, 112 U. S. 452, 474, 5 Sup. Ct. 221, and  
 9 114 U. S. 218, 223, 5 Sup. Ct. 857; *Hanley v. Donoghue*, 116 U. S. 1, 6, 6 Sup. Ct. 242;  
 10 *Bank v. Francklyn*, 120 U. S. 747, 751, 7 Sup. Ct. 757; *Gormley v. Bunyan*, 138 U. S.  
 11 623, 11 Sup. Ct. 453; *Martin v. Railroad Co.*, 151 U. S. 673, 678, 14 Sup. Ct. 533. Taking  
 12 judicial notice of the constitution and laws of the state . . . 1 Greenl. Ev. § 6; *Brown v. Piper*,  
*91 U. S. 37, 42*; *Gardner v. The Collector*, 6 Wall. 499; *Hoyt v. Russell*, 117 U. S. 401, 6 Sup. Ct. 881; *Jones v. U. S.*, 137 U. S. 202, 216, 11 Sup. Ct. 80.

13 In *Brown et al. v. Piper*, 91 U.S. 37, 42, 43 (1875), to wit:

15 Among the things of **which judicial notice** is taken are the law of nations; the  
 16 general customs and usages of merchants; the notary's seal; things which must  
 17 happen according to the laws of nature; the coincidences of the days of the week with  
 18 those of the month; the meaning of words in the vernacular language; the  
 19 **customary abbreviations of Christian names**; the accession of the Chief Magistrate  
 20 to office, and his leaving it. In this country, such notice is taken of the appointment  
 21 of members of the cabinet, the election and resignations of senators, and of the  
 22 appointment of marshals and sheriffs, but not of their deputies. The **courts of the**  
 23 **United States take judicial notice** of the ports and waters of the United States where  
 24 the tide ebbs and flows, of the **boundaries of the several States and judicial districts**,  
 25 and of the **laws and jurisprudence of the several States** in which they  
 26 exercise jurisdiction. **Courts will take notice of whatever is generally known within**  
 27 **the limits of their jurisdiction**; and, if the judge's memory is at fault, he may refresh  
 it by resorting to any means for that purpose which he may deem safe and proper.  
*Ibid* @ 43, **But it is a thing in the common knowledge and use of the**

1  
2       **people throughout the country. Notice and proof were, therefore, unnecessary.**  
3  
4

5       **XIII. Judicial Notice of the Publications in the Federal Register and if they have**  
6       **"Force and Effect of Law", i.e., are a "Substantive Regulation" being the**  
7       **same as a Statute of the United States**

8  
9       This Court is to take judicial Notice the Federal Register Act of 1935 being one of the  
10      Public Statutes of the United States, and as mandated within the Federal Act of 1935,  
11  
12      49 Stat. 502 Sec. 7 "The contents of the Federal Register shall be judicially noticed and,  
13  
14      without prejudice to any other mode of citation, may be cited by volume and page number"  
15      codified today at 44 U.S.C. § 1507.  
16

17      Then the next test of the judicial Noticed publications in the Federal Register mandated  
18      by Congress is contained within the Administrative Procedure Act of 1946 to see if any of the  
19      regulations are "**substantive regulations**" having the "**force and effect of law**" or are they  
20      merely "**interpretative regulations**" which can never be violated or be grounds for any legal  
21      actions, they do not create any enforceable rights and the courts are not required to give any  
22      effect to "**interpretative regulations**."

23  
24      Within the **Federal Register Act of 1935** includes but not limited to: documents that  
25  
26      "have general applicability and legal effect", [S]uch documents or classes of documents as

1 **may be required so to be published by Act of the Congress**", the Administrative Committee  
2 is mandated to implement the Federal Register Act by regulations, the contents of the Federal  
3 Register shall be judicially noticed, and no document required to be published is valid against  
4 any person until published in the Federal Register.

5 Within the **Administrative Procedure Act of 1946** including but not limited to:

6 proposed rulemaking shall be published in the Federal Register known as "Informal Rulemaking  
7 (not used by IRS) to establish "substantive rules adopted as authorized by law" ("by law" means)  
8 that has the "force and effect of law", "reference to the authority under which the rule is  
9 proposed "(required for "substantive rules" to show statutory authority source), "either the terms  
10 or substance of the proposed rule or a description of the subjects and issues involved, and the  
11 "effective date . . . of any substantive rule . . . not less than thirty days prior to the effective date"  
12 (must wait 30 days after Final Rule published for substantive rules to take effect unless "good  
13 cause found"). Formal Rulemaking is a trial type of establishing rules using "where notice or  
14 hearing is required by statute", which is not used by the IRS or almost never by any other agency

15 Contained also in the Administrative Procedure Act of 1946 "[T]his subsection **shall not**  
16 **apply to interpretative rules**, general statements of policy, rules of agency organization,  
17 procedure, or practice, or in any situation in which the agency for cause finds . . .",  
18 wherein "interpretative rules" establishes no Obligation of Law, i.e. by Operation of Law, no  
19

1 known legal duty, wherein all “interpretative regulations” “do not create enforceable rights 5  
 2 U.S.C. §§ 553(b), 553(d)” and “it [agencies] cannot ground legal action in a violation of its  
 3 interpretive rule.”  
 4  
 5  
 6

#### XIV. Evidence Rule 201

7  
 8  
 9 And further this court shall take judicial Notice under the Federal Evidence Rule of 201  
 10 “adjudicative facts” does invoke the Federal Rules of Evidence of Rule 201(d)(f)(g) for  
 11 mandatory judicial Notice including but not limited to Rule 201 **(d) When mandatory.** A court  
 12 **shall take judicial notice if requested by a party and supplied with the necessary**  
 13 **information.**; and, 201(f) **(f) Time of taking notice.** Judicial notice may be taken at any stage  
 14 of the proceeding.”; and, 201(g) **Instructing jury.** In a civil action or proceeding, the court  
 15 shall instruct the jury to accept as conclusive any fact judicially noticed” for all of the Federal  
 16 Register publications cited herein.  
 17  
 18

In *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, (10<sup>th</sup> Cir. 2007) “As he  
 correctly asserts, Rule 201(d) makes the rule **mandatory when it applies:** “**A court shall**  
**take judicial notice if requested by a party and supplied with the necessary information.**”  
 See *Johnson v. Chater*, 108 F.3d 942, 946 (8<sup>th</sup> Cir. 1997). In *United States v. Wilson*, 631 F.2d  
 118 (9<sup>th</sup> Cir. 1980) “Fed.R.Evid. 201(b)(2) permits judicial notice of a fact that is “not subject  
 to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to  
 sources whose accuracy cannot reasonably be questioned.” In particular, a court may take  
**judicial notice of its own records** in other cases, as well as the **records of an inferior court**  
**in other cases.**”

1 There is an exhaustive discussion of the exclusion of judicial Notice of the Law under  
 2 Evidence Rule 201 in *Getty Petroleum Marketing, Inc. v. Capital Terminal Co.*, 391 F.3d 312,  
 3 321-22 (1<sup>st</sup> Cir. 2004) referencing the proposing of an Evidence Rule 203 [Judicial Notice of the  
 4 Law] by Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of*  
 5 *Evidence with Supporting Commentary*, 171 F.R.D. 330, 405 (1997) *Ibid.* at 322 “Although  
 6 judicial notice of fact and judicial notice of law share the phrase “judicial notice,” they draw on  
 7 different rules of practice. Rule 201 “governs only judicial notice of adjudicative facts.”  
 8 Fed.R.Evid. 201(a). Judicial notice of law is outside the scope of Rule 201, and derives from  
 9 practical considerations and case law that do not rely on Rule 201 or principles of evidence.  
 10 [FN14].” But even if “judicial Notice of the Law” might be considered outside of “adjudicative  
 11 facts” there are other circumstances that it might be an included, remembering that *Getty*,  
 12 *supra*, does not in any way question that the Court must take judicial Notice of the Law.  
 13  
 14

15  
 16  
 17  
 18  
 19  
 20 **XV. Adjudicative Fact or Legislative Fact**

21  
 22 In *United States v. Bello*, 194 F.3d 18, 22, 23 (1<sup>st</sup> Cir. 1999), to wit:  
 23

24 To qualify for **judicial notice**, a fact “must be one not subject to dispute in that it is either  
 25 (1) generally known within the territorial jurisdiction of the trial court or (2) capable of  
 26 accurate and ready determination by resort to sources whose accuracy cannot reasonably  
 27 be questioned.” \* \* \* *Ibid.* at 23 Whether a fact is **adjudicative** or **legislative** depends  
 not on the nature of the fact-e.g., who owns the land-but rather on the use made of it (i.e.,  
**whether it is a fact germane to what happened in the case or a fact useful in**

1 formulating common law policy or interpreting a statute) and the same fact can play  
 2 either role depending on context. See Fed.R.Evid. 201, Advisory Committee's note  
 3 ("Adjudicative facts are simply the facts of the particular case. Legislative facts, on  
 4 the other hand, are \*23 those which have relevance to legal reasoning and the lawmaking  
 5 process....").

6 In *United States v. Williams*, 442 F.3d 1259, 1261 (10<sup>th</sup> Cir. 2006) " "That the courts are  
 7 allowed to take judicial notice of statutes is unquestionable." *United States v. Coffman*, 638  
 8 F.2d 192, 194 (10th Cir.1980). Statutes are considered legislative facts—"established truths, facts  
 9 or pronouncements that do not change from case to case but apply universally"—and courts may  
 10 take notice of legislative facts." In *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349  
 11 (6<sup>th</sup> Cir. 2002) "However, whether a fact is adjudicative or legislative depends upon the manner  
 12 in which it is used. *United States v. Bello*, 194 F.3d 18, 22-23 (1st Cir.1999). A legal rule may  
 13 be a proper fact for judicial notice if it is offered to establish the factual context of the case, as  
 14 opposed to stating the governing law." In *Vela v. City of Houston*, 276 F.3d 659, FN26  
 15 (5<sup>th</sup> Cir. 2001) "The power is less constrained than its power to take notice of adjudicative facts.  
 16 (cites omitted)."

17 In *Quailey v. Clo-Tex Intern., Inc.*, 212 F.3d 1123, 1128 (8<sup>th</sup> Cir. 2000), to wit:

18 Adjudicative facts are "facts that normally go to the jury in a jury case. They relate to the  
 19 parties, their activities, their properties, their businesses." *Id.*; see also U.S. v. Gould, 536  
 20 F.2d 216, 219 (8th Cir.1976) (stating that adjudicative facts concern "who did what,  
 21 where, when, how and with what motive or intent.") (quoting 2 Kenneth Davis,  
 22 Administrative Law Treatise § 15.03 at 353 (1958)). By contrast, "[l]egislative facts do  
 23 not relate specifically to the activities or characteristics of the litigants. A court generally  
 24 relies upon legislative facts when it purports to develop a particular law or policy and  
 25 thus considers material wholly unrelated to the activities of the parties."

## **XVI. Judicial Notice and Motion to Dismiss**

In *Mullis v. U.S. Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9<sup>th</sup> Cir. 1987) "However, facts subject to judicial notice may be considered on a motion to dismiss.

In *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9<sup>th</sup> Cir. 1986) “On a motion to dismiss, however, a court may take judicial notice of acts outside the pleadings.”

This court shall take judicial Notice of the cases, Congressional Records of Congress and other public records including Statutes of the United States, United States Code (U.S.C.) and Code of Federal Regulations (“CFR”) published including but not limited to, in the Federal Register and as mandated in Federal Register Act of 1935 at 49 Stat 502 Sec. 7 (44 U.S.C. § 1507) “The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.”

**XVII. Court Will Take Judicial Notice of Facts Which Vest United States  
with Jurisdiction**

In *United States v. Benson*, 495 F.2d 475, 481 (5<sup>th</sup> Cir. 1974) (“‘The court will take judicial notice of (the) facts which vest the United States with jurisdiction . . .’, *Hudspeth v. United States*, 5 Cir. 1955, 223 F.2d 848, citing *Brown v. United States*, 5 Cir. 1919, 257 F. 46.”

### **XIII. Courts Can't Take Judicial Notice of Laws of Other Countries**

**Without Plea and Proof**

In *Liverpool & B.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 445 (1889), to wit:

The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. *Church v. Hubbart*, 2 Cranch, 187, 236; *Ennis v. Smith*, 14 How. 400, 426, 427; *Dainese v. Hale*, 91 U. S. 13, 20, 21; *Pierce v. Indseth*, 106 U. S. 546, 1 Sup. Ct. Rep. 418; *Ex parte Cridland*, 3 Ves. & B. 94, 99; *Lloyd v. Guibert*, L. R. 1 Q. B. 115, 129, 6 Best & S. 100, 142. In the case last cited, Mr. Justice WILLES, delivering judgment in the exchequer chamber, said: 'In order to preclude all misapprehension, it may be well to add that a party who relies upon a right or an exemption by foreign law is bound to bring such law properly before the court, and to establish it in proof. Otherwise the court, not being entitled to notice such law without judicial proof, must proceed according to the law of England.'

## **XIX. Law not Cited Isn't Excluded From Judicial Notice Upon Appeal**

In *Schultz v. Tecumseh Products*, 310 F.2d 426, 433 (6<sup>th</sup> Cir. 1962), to wit:

Notwithstanding these observations, however, counsel's failure to **cite law of which a United States Court must take judicial notice, and which controls the disposition of the case, does not render such law inapplicable or prevent reliance upon it on appeal.** *Parkway Baking Company v. Freihofer Baking Company*, 255 F.2d 641, 646

*United State v. Certain Parcels of Land, etc.*, 144 F.2d 626, 630 (C.A.3, 1944). See, also, *Jenkins v. Collard*, 145 U.S. 546, 560, 561, 12 S.Ct. 868, 36 L.Ed. 812; *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 488, 489, 63 S.Ct. 347, 87 L.Ed. 411.

1                   **XX. No Judicial Notice of Ordinances Usually**

2

3                   There is an exhaustive examination of ordinance not being subject in *Getty Petroleum*

4                   *Marketing, Inc., v. Capital Terminal Co.*, 391 F.3d 312, 320-21 (1<sup>st</sup> Cir. 2004)

5

6                   “Municipal ordinances and private codes referred to in statutes historically have not been

7

8                   included within this general rule of judicial notice of law. Under traditional rules, even a

9

10                  **municipal ordinance must be put into evidence** (cites omitted) . . . “**municipal ordinances**

11                  **may not be judicially noticed by courts of general jurisdiction**” (cites omitted) . . . it

12                  must be pleaded, like any other fact of which judicial notice will not be taken. (cites omitted).”

13

14                  In *United States v. City of Miami, Fla.*, 654 F.2d 435, FN16 (5<sup>th</sup> Cir. 1981) “Although

15                  the ordinance has never been introduced as evidence, we can take judicial notice of it.

16

17                  (cites omitted).”

18

19

20                   **XXI. Bankruptcy**

21

22                  In *In re Digby*, 47 B.R. 614, 618, 620 (Bkrtrcy, Ala 1985) “The Federal Rules of Evidence

23

24                  apply in bankruptcy cases. FN5 Bankruptcy Rule 9017.” *Ibid. at 620* “Because the taking of

25                  judicial notice of a fact by a bankruptcy judge is regulated by the Federal Rules of Evidence only

26

27                  if the fact is an “adjudicative fact,” (FN11 Fed. Rule of Evid. 201(a) the distinction between this

1 type of fact and a “legislative fact” must be noted. An “**adjudicative fact**” concerns the parties  
2 **to a proceeding**, as contrasted with a “legislative fact” which is general and broad and relates  
3 to the parties not as individuals or particular entities but unspecifically”  
4  
5  
6

7 **XXII. Refusing to Take Judicial Notice is Reviewed for Abuse of Discretion**

8  
9 In *Lazano v. Ashcroft*, 258 F.3d 1160, 1164 (10<sup>th</sup> Cir. 2001) “The court’s decision whether to  
10 take judicial notice of facts is reviewed for abuse of discretion.” See *United States v. Wolny*, 133  
11 F.3d 758 (10<sup>th</sup> Cir. 1998).” See *United States v. McIntosh*, 124 F.3d 1330, 1338 (10<sup>th</sup> Cir. 1997).  
12  
13 In *United States v. Mitchell*, 113 F.3d 1528, 1531 (10<sup>th</sup> Cir. 1997) ““In reviewing a  
14 court’s determination for **abuse of discretion**, we will not disturb the determination absent a  
15 **distinct showing** it was based on a **clearly erroneous finding of fact or an erroneous**  
16 **conclusion of law or manifests a clear error of judgment.**” *Cartier v. Jackson*, 59 F.3d  
17 1046, 1048 (10th Cir.1995).”  
18  
19

20 **XXIII. Plain Error, De Novo, Abuse of Discretion**

21  
22 In *Pierce v. Underwood*, 487 U.S. 552, 558 (1984) “For purposes of standard of review,  
23 decisions by judges are traditionally divided into three categories, denominated **questions**  
24  
25

1 of law (reviewable *de novo* ), questions of fact (reviewable for clear error), and matters of  
2 discretion (reviewable for “abuse of discretion”)  
3

4 In *United States v. Bowser*, 941 F.2d 1019, 1021 (10<sup>th</sup> Cir. 1991) ““Because defendant  
5 did not object to admission of this testimony at trial, we review for plain error. Fed.R.Crim.P.  
6 52(b) (“Plain errors or defects affecting substantial rights may be noticed although they  
7 were not brought to the attention of the court.”). Plain errors are those errors that when viewed  
8 against the entire record “ ‘seriously affect the fairness, integrity or public reputation of  
9 judicial proceedings.’ ” *United States v. Young*, 470 U.S. 1, 15-16 (1984).”  
10  
11

12 In *United States v. Young*, 470 U.S. 1, 15-16 (1984), to wit:  
13  
14

15 The plain-error doctrine of Federal Rule of Criminal Procedure 52(b) <sup>FN12</sup> tempers the  
16 blow of a rigid application of the contemporaneous-objection requirement. The Rule  
17 authorizes the Courts of Appeals to correct only “particularly egregious errors,” *United*  
18 *States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982), those  
19 errors that “seriously affect the fairness, integrity or public reputation of judicial  
proceedings,” *United States v. Atkinson*, 297 U.S., at 160, 56 S.Ct., at 392.  
20  
21

22 FN12. Federal Rule of Criminal Procedure 52(b) provides: “Plain errors or defects  
23 affecting substantial rights may be noticed although they were not brought to the  
attention of the court.  
24  
25  
26  
27